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No. 84-210

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

W. P. MCDONALD,
Petitioner

v.

BRANIFF AIRWAYS, INC., *et al.*,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS BRANIFF AIRWAYS, INC. AND AIR LINE PILOTS ASSOCIATION, INT'L.

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October 5, 1984

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Respondents Braniff Airways, Inc. ("Braniff") [1] and the Air Line Pilots Association, International ("ALPA") respectfully request the Court to deny the petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit in this case. The case was correctly decided below, and there is no basis for granting the writ requested.

[1] Pursuant to Rule 28.1, respondent Braniff states that under a plan of reorganization consummated on December 15, 1983, Braniff changed its name to Dalfort Corporation, and Braniff's previous parent, Braniff International Corporation, was liquidated. Dalfort Corporation owns approximately 80% of a newly-created subsidiary, Braniff, Inc., and Hyatt Air Corporation, an affiliate of Hyatt Corporation, owns approximately 80% of Dalfort Corporation.

SUMMARY

Petitioner has failed to demonstrate special and important reasons warranting a grant of his petition. By his own admission, this is a case of "first and potentially only impression," and there are no other court decisions, let alone conflicting decisions, construing the statutory provision at issue. The decisions below correctly and unanimously rejected petitioner's interpretation of the law, adopting instead the interpretation of the Pension Benefit Guaranty Corporation, the government agency explicitly charged by Congress with administering this statute.

REASONS FOR DENYING THE WRIT

I. The Special and Important Reasons Required for Grant of Certiorari Are Lacking in This Case

The Rules of this Court provide as follows regarding the grant of a writ of certiorari:

> "A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." Rule 17.1.

In elaborating on the exercise of this discretion, the Rules cite a number of factors to be considered. In general, these factors contemplate a conflict between the decision in question and one or more other decisions of appellate courts. There is no such conflict here. The petition itself states—

> "Obviously, the issue presented in this case is a narrow one. The issue is one of first and potentially only impression." *Id.* at 4.

Nor has the petitioner suggested that the court below "so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." Rule 17.1(a). As the Court itself has noted with

respect to *certiorari* petitions, the Court does not "sit for the benefit of the particular litigants." *Rice* v. *Sioux City Memorial Park Cemetery,* 349 U.S. 70, 74 (1955). On the basis of the foregoing, we submit that there are no "special and important reasons" for granting certiorari, and that no such writ should issue.

Petitioner, who represents a class of certain retired participants, seeks to convince the Court otherwise, characterizing the decisions below as "palpably wrong," and asserting that an "important federal pension policy is at stake." *Id.* at 4. Petitioner's latter assertion is paradoxical in light of his prior admissions. Petitioner does not explain how a decision can at once threaten an "important federal pension" policy, and at the same time involve an issue of "first and potentially only impression." The fact is that the issue in question is important *only* to petitioner and those in the class he represents.

As to the correctness of the decision below, the issue was fully briefed and argued before three levels of federal courts, each of which soundly rejected the arguments set forth by petitioner here. The decision of the bankruptcy court was affirmed after a *de novo* review by the district court, and a court of appeals panel, after full briefing and oral argument, affirmed the district court's decision *per curiam.* The interpretation adopted by these courts was that propounded by respondent Pension Benefit Guaranty Corporation ("PBGC"), the government agency charged with administering this statute. Petitioner's disagreement with the statutory construction of these courts, a construction also reached by the PBGC, does not provide an appropriate basis for the grant of *certiorari.*

Moreover, in reliance on the orders of the federal bankruptcy and district courts (orders affirmed in due course by the federal appeals court), the *res* at issue here was distributed for the benefit of plan participants in 1983. Distribution was necessary in order to preserve entitlement to favorable tax treatment.[2] Appellants, who were on notice of the proposed

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[2] Section 402(e) of the Internal Revenue Code of 1954, as amended ("Code"), provides favorable taxation of "lump sum distributions." In order to qualify as a "lump sum distribution," the entire balance to the credit of a

(footnote continues)

distribution, neither sought nor obtained a stay of the lower court orders. Thus, the issue as to which appellants seek review has only academic interest, making any grant of *certiorari* even more improvident. *See Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. at 74.

II. The Decisions Below Are Correct on the Merits

As petitioner has also noted, the issue in this case turns on the narrow technical interpretation of a provision of the Employee Retirement Income Security Act of 1974 ("ERISA"). That provision, ERISA section 4044(a)(3) (29 U.S.C. § 1344(a)(3)), describes the third of six priority classes for the allocation of assets upon termination of a defined benefit pension plan. Benefits in the third class are to be paid after benefits in the first two priority classes have been paid, but prior to payment of those in the fourth, fifth and sixth.

Based on the interpretation of the courts below, assets in the plan at issue here will run out somewhere in the fifth priority class. Petitioner's interpretation would greatly augment benefits entitled to third priority (augmented benefits which, under any interpretation, would go only to some retired pilots and some pilots eligible for retirement), and would likely result in the assets running out in the third or fourth class, to the great detriment of other plan participants whose benefits are entitled only to a lower priority.

To be eligible as a third priority benefit under the statute, several criteria must be met.[3] The only criterion at issue here, however—a criterion that petitioner has garbled and mis-

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(footnote continued)

plan participant must be distributed within one taxable year. Code § 402(e)(4)(A). Distributions had already occurred in 1983 from plans that would be aggregated with this plan in determining the balance to the credit of each participant. *Cf.* Code § 402(e)(4)(C).

[3] In full, ERISA section 4044(a)(3) provides as follows:

"(3) Third, in the case of benefits payable as an annuity—

"(A) in the case of the benefit of a participant or beneficiary which was in pay status as of the beginning of the 3-year period

(footnote continues)

construed—is the statutory requirement that the benefit be "based on the provisions of the plan (as in effect during the 5-year period ending on such date [*i.e.*, the termination date of the plan]) under which such benefit would be the least."

The benefit which petitioner argues should receive a third priority is, without dispute, not the lowest benefit in effect during the 5-year period, but rather, the highest of three in effect during such period. Nonetheless, on the basis of a distorted statutory reading, and in defiance of unambiguous legislative history,[4] petitioner argues that the lowest benefit in effect during the *three*-year period prior to plan termination should be accorded third priority treatment. As properly recognized by the courts below, this interpretation is contrary to the plain meaning of the statute and the relevant legislative history.

Alternatively, petitioner seeks to bring his interpretation within the ambit of regulations promulgated by the Pension Benefit Guaranty Corporation. However, petitioner's view of

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(footnote continued)

> ending on the termination date of the plan, to each such benefit, based on the provisions of the plan (as in effect during the 5-year period ending on such date) under which such benefit would be the least,
>
> "(B) in the case of a participant's or beneficiary's benefit (other than a benefit described in subparagraph (A)) which would have been in pay status as of the beginning of such 3-year period if the participant had retired prior to the beginning of the 3-year period and if his benefits had commenced (in the normal form of annuity under the plan) as of the beginning of such period, to each such benefit based on the provisions of the plan (as in effect during the 5-year period ending on such date) under which such benefit would be the least.
>
> "For purposes of subparagraph (A), the lowest benefit in pay status during a 3-year period shall be considered the benefit in pay status for such period."

[4] The ERISA Conference Committee Report states that assets are to be allocated to the third priority "at the lowest benefit level under the plan during the *five* years prior to termination . . . ." H.R. Rep. No. 1280, 93d Cong., 2d Sess. 375 (1974) (emphasis supplied).

the PBGC regulation is clearly incorrect, and has been rejected by both the PBGC itself and the federal courts to which this view was presented. These courts were clearly entitled to rely on the agency's interpretation of its own regulation. *United States* v. *Larionoff*, 431 U.S. 864, 872 (1977).

CONCLUSION

On the basis of the foregoing, we ask that the petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit be denied.

Respectfully submitted,

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